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Attorneys for Defendants/Counterclaim Plaintiffs – the McCartheys

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SALT LAKE TRIBUNE PUBLISHING
COMPANY, LLC.,

Plaintiff,

-vs-

AT&T CORPORATION and KEARNS-
TRIBUNE, LLC., et al.,

Defendants.

MEDIANEWS GROUP, INC., and
KEARNS-TRIBUNE, LLC., et al.,

Plaintiffs/Counterclaim Defendants,

-vs-

PHILIP G. McCARTHEY, THOMAS K.
McCARTHEY, SARAH J. McCARTHEY,
SHAUN P. McCARTHEY and
MAUREEN P. McCARTHEY,

Defendants/Third-Party Plaintiffs.

-vs-

THIRD-PARTY COMPLAINT

Case Nos. 2:00-CV-936ST
2:03-CV-176PGC
(Consolidated into and with
Case No. 2:00-CV-936ST)

Magistrate Judge Samuel Alba

(REQUEST FOR JURY TRIAL)

ATL

DESERET NEWS PUBLISHING	:
COMPANY, a Utah corporation, DESERET:	:
MANAGEMENT CORPORATION, a Utah :	:
corporation, AT&T CORPORATION, a	:
New York corporation, COMCAST	:
CORPORATION, a Pennsylvania	:
corporation, DIRKS, VAN ESSEN &	:
MURRAY, a New Mexico corporation,	:
R. GARY GOMM and	:
JOHN/JANE DOES 1-25,	:
	:
Third-Party Defendants.	:

The Defendants/Third-Party Plaintiffs, Philip G. McCarthy, Thomas K. McCarthy, Sarah J. McCarthy, Shaun P. McCarthy and Maureen P. McCarthy (the “McCartheys” or the “Family”), allege:

PARTIES, JURISDICTION AND VENUE

1. This is a Federal Rule of Civil Procedure 14 Third-Party Complaint. All of the claims asserted in this pleading arise out of transactions, occurrences, claims, and defenses that are the subject matter of the Plaintiffs, Kearns-Tribune, LLC (“KTLLC”) and MediaNews, Group, Inc.’s (“MNG”), declaratory judgment action complaint filed against the McCartheys, a copy of which is attached to this Third-Party Complaint, marked Exhibit “A.”

2. Subject matter jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1332 relating to diversity actions and ancillary and supplemental jurisdiction.

3. Venue is proper pursuant to 28 U.S.C. § 1391 and properly lodged in the U.S. District Court for the Central District of Utah.

4. Defendant/Third-Party Plaintiff Philip G. McCarthy is a citizen of the State of Utah.
5. Defendant/Third-Party Plaintiff Thomas K. McCarthy is a citizen of the State of Utah.
6. Defendant/Third-Party Plaintiff Sarah J. McCarthy is a citizen of the State of Illinois.
7. Defendant/Third-Party Plaintiff Shaun P. McCarthy is a citizen of the State of Washington.
8. Defendant/Third-Party Plaintiff Maureen P. McCarthy is a citizen of the State of California.
9. Third-Party Defendant Deseret News Publishing Company (“DNPC”) is a Utah corporation with its principal place of business in Salt Lake City, Utah.
10. Third-Party Defendant Deseret Management Corporation (“DMC”) is a Utah corporation with its principal place of business in Salt Lake City, Utah.
11. Third-Party Defendant AT&T Corporation (“AT&T”) is a New York corporation with its principal place of business in New Jersey.
12. Third-Party Defendant Comcast Corporation (“Comcast”) is a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania.
13. Third-Party Defendant Dirks, Van Essen & Murray (“DVM”) is, on information and belief, a New Mexico corporation with its principal place of business in Santa Fe, New Mexico.

14. Third-Party Defendant R. Gary Gomm (“Gomm”) is a citizen of the State of Texas.

15. Third-Party Defendants John/Jane Does 1-25 are additional individuals and/or business entities that upon discovery will be added as Third-Party Defendants to this action.

INTRODUCTION

16. At issue in this Third-Party Complaint is a conspiracy to willfully disregard the rule of law, act in bad faith, and violate and destroy the rights of the McCarthey Family. Those rights were created in 1997 in connection with the merger of Kearns-Tribune Corporation (“KT”) with TeleCommunications, Inc. (“TCI”). That merger could not have been accomplished without the consent of the Family who owned approximately 40% of the issued and outstanding shares of KT at the time of the merger. In 1997, after years of hard fought negotiations, the McCartheys, based upon an agreement among the Family, KT and TCI (the “Family Agreement”), agreed to convey their KT shares to TCI and vote for the KT-TCI merger.

17. The Option and Management Agreements at issue in the SLTPC litigation¹ are related to the Family Agreement, but the Family Agreement is a separate and distinct contract. The Family Agreement included a covenant that the Family or its affiliates could repurchase the *Salt Lake Tribune* (the “*Tribune*”) at a fair price calculated on well understood valuation principles. It was the intent of all parties that the same valuation principles employed to value the *Tribune* assets in connection with the 1997 KT-TCI Merger would be used to calculate the

¹ The McCartheys’ claims are separate and distinct from those brought by SLTPC (*Salt Lake Tribune Publishing Co. v. AT&T*, No. 2:00cv936; the “SLTPC Case”) to enforce its option to purchase *The Salt Lake Tribune*. The McCartheys’ claims are based on their individual rights, including contractual, legal and equitable rights, which are independent of the rights of SLTPC.

fair price of those assets at the time of reacquisition. Through the intentional misconduct of MNG and KTLLC and the Third-Party Defendants named in this Complaint, this and other covenants of the Family Agreement were breached and the rights of the Family, bargained for and granted in 1997, have been extinguished.

18. No other shareholders of KT were party to the Family Agreement. The terms of the Family Agreement were negotiated among individuals who had 40 years of business and personal relationships. All of those negotiators agree as to the terms of the Family Agreement and the overt violation of the Family's rights by the Co-conspirators, all of whom knew of the Family's rights and acted intentionally and in concert to extinguish those rights. The Family seeks redress from the Court for the intentional violation of its rights.²

19. The first assault on the Family Agreement occurred when the telecommunications giant, AT&T, attempted to sell the *Tribune* to DNPC rather than SLTPC. While AT&T concealed this portion of the scheme from the McCarthey Family, AT&T disclosed it privately to selected Utah government officials. AT&T's pursuit of the sale of the *Tribune* to DNPC was driven by a desire to protect AT&T's Utah cable franchise and to advance its national business agenda by currying favor with influential Utah political and religious leaders.

20. After DNPC learned AT&T would not sell the *Tribune* to DNPC, the assault on the rights of the McCartheys continued. MNG, KTLLC and certain of the Third-Party Defendants decided to place the *Tribune* in the Church of Jesus Christ of Latter Day Saints ("LDS Church")-friendly hands of MNG. In doing so, AT&T sold KT to MNG, well knowing

² The McCartheys have filed an Answer and Counterclaim simultaneously with this Third-Party Complaint. The Counterclaim names MNC and KTLLC as defendants. The Answer and the Counterclaim are incorporated by reference into this Third-Party Complaint.

that as part of the arrangement, MNG, KTLLC and the Third-Party Defendants would use the sale to destroy the McCarthy Family's rights to manage and own the *Tribune*.

21. When SLTPC sought to enjoin MNG's acquisition of the *Tribune*, MNG recognized that it had to give the impression that it would honor the Option Agreement and the Management Agreement – even though MNG, KTLLC and certain of the Third Party Defendants– were then secretly pursuing action to invalidate or avoid performance of those agreements. MNG, to advance the scheme, solemnly assured the Court that it would resolutely honor and be bound by the Option Agreement and the Management Agreement. By doing so, AT&T was able to dissuade the Honorable Tena Campbell from enjoining AT&T's sale of KTLLC to MNG. After Judge Campbell's departure from the case, MNG continued to make a series of false, incomplete, and otherwise misleading statements designed to bolster the impression that the Option Agreement and the Management Agreement would be honored and observed. The subsequent actions of MNG, KTLLC and the Third Party Defendants in attacking the Option demonstrate that MNG's plan all along was not to “honor” the Option Agreement, but to destroy it and prevent the McCartheys from ever regaining ownership of the *Tribune*.

22. After the Tenth Circuit declared the Option Agreement valid and enforceable, MNG, KTLLC and certain of the Third Party Defendants revised their plan to defeat the McCartheys' rights under the Family Agreement. Through an irregular, defective and biased appraisal process aimed at preventing the McCarthy Family from reacquiring the *Tribune*, the newspaper was valued at a grossly inflated price which exceeded its value by more than \$150 million.

23. As will be set out in detail in this Third-Party Complaint, DNPC, DMC, AT&T, Comcast, and Gomm joined and actively participated in the conspiracy to interfere with and destroy the Family Agreement. Their interference was aided and abetted by the substantial assistance of DVM which produced a grossly deficient appraisal report.

24. The denigration of the judicial process by MNG, in concert with and/or aided and abetted by DNPC, AT&T, DVM, and the other Third-Party Defendants and the many actionable violations of the McCarthy Family's legal rights require redress through this Third-Party Complaint and the Counterclaim filed concurrently.

FACTUAL ALLEGATIONS

The McCarthy Family and the History of the *Tribune*

25. The McCarthy Family is composed of Thomas K. McCarthy, Philip G. McCarthy, Sarah J. McCarthy, Shaun P. McCarthy, and Maureen P. McCarthy, who are the children of Thomas Kearns McCarthy ("TKM"). The Qualified Terminable Interest Property Trust ("QTIP Trust") was created in 1982 for the benefit of Jane F. McCarthy (now deceased) and TKM's children.

26. TKM was the grandson of United States Senator Thomas Kearns ("Senator Kearns"), who acquired the *Tribune* in 1901. Senator Kearns, a unique figure in Utah history, acquired the *Tribune* to perpetuate the existence of a general circulation, daily newspaper which historically had provided the residents of Utah with an independent voice for free, diverse and open expression of views, thoughts and opinions, a newspaper distinct from the LDS Church-owned *Deseret News*.

27. The *Tribune's* editorial policy was deeply rooted in the conditions for Utah attaining statehood and is historically supported in the Utah State Constitution precepts of Freedom of Speech and Separation of Church and State, Article I, §§ 1; 4.

28. TKM was dedicated to preserving the mission of the *Tribune* which had been entrusted to him by his grandfather, Senator Kearns. He established the QTIP Trust in 1982 to ensure that his descendants would also continue to preserve the mission of the *Tribune*. In 1989, TKM appointed Jack Gallivan ("Gallivan") as a trustee of the QTIP Trust. The McCarthy Family, together with Gallivan, have always considered their responsibility to the mission of the *Tribune* as a morally binding, life-time commitment to maintain ownership and control of the *Tribune* for Senator Kearns' descendants.

The 1952 Joint Operating Agreement, and the Creation of the Newspaper Agency Corporation

29. For the first half of the twentieth century, the *Tribune* and the *Deseret News* operated independently, and were managed as competing newspapers. Each newspaper maintained separate business offices, management personnel, and printing facilities.

30. In the early 1950's, David O. McKay, the then-President of the LDS Church, on behalf of the *Deseret News* and its owner, the LDS Church, initiated negotiations with John Fitzpatrick, the Publisher of the *Tribune*, regarding whether the *Tribune* would assume the business operations, production and management of the *Deseret News*. This request by the *Deseret News* was founded on the reality that for a number of prior years, the *Deseret News* had suffered significant financial losses in its efforts to retain circulation in direct competition with the *Tribune*.

31. On August 12, 1952, following protracted negotiations, Salt Lake Tribune Publishing Co., the West Virginia corporation that then owned and published the *Tribune*, and DNPC, owner and publisher of the *Deseret News*, entered into an agreement, whereby, among other things, the parties committed to share and combine printing, advertising and other operational departments through the creation of a jointly owned entity known as the Newspaper Agency Corporation (“NAC”). The parties have referred to this agreement as the 1952 Joint Operating Agreement (“1952 JOA”). The 1952 JOA and the formation of NAC had no effect on the editorial functions of the two newspapers. The newspapers remained competitors, but streamlined their production and distribution processes.

32. The 1952 JOA, therefore, generally authorized NAC to manage certain common operational activities of the *Tribune* and the *Deseret News*, including, but not limited to, advertising, distribution, circulation, billing and printing, while preserving complete editorial, news gathering and newsroom independence for each publication.

33. Without the cost savings and other operational efficiencies created by the 1952 JOA, the *Deseret News* would have been forced to discontinue publication due to the significant and mounting financial losses it had suffered.

34. The 1952 JOA provided that NAC would issue 100 shares of stock, 50 shares to be held by nominees of the *Deseret News*, and 50 shares by nominees of the *Tribune*.

35. Ownership of NAC stock has changed hands several times since 1952. On information and belief, DNPC currently holds fifty shares of NAC stock, and KTLLC holds the other fifty shares..

36. The JOA is exempt from Federal Anti-Trust laws under the Newspaper Preservation Act (15 U.S.C.A. §§ 1801 to 1804).

The 1982 Amendments to the 1952 JOA

37. The 1952 JOA had an expiration date of December 31, 1982. Starting in 1980, DNPC and KT initiated negotiations in an effort to amend the 1952 JOA, and extend the working relationship created by that agreement. During the ensuing two years, the parties carefully crafted mutual rights, responsibilities and relationships resulting in a number of important changes to the 1952 JOA.

38. The amendments to the 1952 JOA included, among other changes, providing the *Deseret News* the opportunity: (1) to publish on Sundays and in the morning on weekdays if certain conditions were met; and (2) to receive a percentage of NAC profit higher than the percentage of total NAC revenue that the *Deseret News* actually generated. The parties have referred to the amended JOA as the 1982 Joint Operating Agreement ("1982 JOA").

Background Regarding the 1997 KT-TCI Reorganization

39. In the 1950's, KT was a founder of TCI. As a founder of TCI, KT owned a large number of shares of TCI stock. In 1997, before the reorganization of TCI and KT, KT owned of record the following TCI shares: (i) 8,792,490 shares of TCI Group Series A Common Stock, (ii) 9,112,500 shares of TCI Group Series B Common Stock ("B Shares"), (iii) 4,436,245 shares of LMG Series A Common Stock, (iv) 2,278,125 shares of LMG Series B Common Stock, and (v) 67,536 shares of Class B 6% Cumulative Redeemable Exchangeable Junior Preferred Stock of TCI. Each B Share had voting rights equal to the voting rights of 10 shares of Series A

common stock. Altogether, TCI shares owned by KT represented approximately 8.2% of the voting power of the outstanding shares of TCI stock.

40. Gallivan, the publisher of the *Tribune*, was also a director of TCI. Gallivan also served at various times as Assistant Publisher of the *Tribune*, Secretary of KT, President and Chairman of KT, a trustee of the QTIP Trust, and the former President and Chairman of NAC.

41. Since KT had acquired shares in TCI, those shares had dramatically increased in value. Indeed, by the early 1990's, KT's shares of TCI were valued at over \$350 million. The value of KT's TCI shares far exceeded the value of all of its other assets, including the *Tribune*.

42. In 1996, after the unexpected death of Bob Magness ("Magness"), another TCI founder and the largest individual TCI shareholder, TCI determined that it needed to take certain steps to ensure continued control by current management. The large voting power of the TCI shares owned by KT, when combined with voting power of other unaffiliated shareholders of TCI, could have effectively controlled the management and policies of TCI. TCI's management determined to engage in a transaction with KT which would enable it to reacquire KT's shares of TCI stock.

43. In the early 1990's, Gallivan recognized that KT and its shareholders faced significant problems resulting from the lack of liquidity of KT shares. Gallivan and others also recognized that, as a result of their low basis in the highly appreciated TCI stock, KT and its shareholders would have large estate tax problems upon the death of one or more significant shareholders.

Gallivan and Malone Discuss Terms and Conditions of the Merger of TCI and KT

44. In the 1990's, the Chairman and Chief Executive Officer of TCI, Dr. John C. Malone ("Malone") and Magness discussed with Gallivan various potential transactions to meet TCI's needs for solidification of control and KT's needs for estate tax relief, liquidity and perpetuation of ownership of the *Tribune* by descendants of Senator Kearns. Magness, Malone and Gallivan had a close business and personal relationship spanning more than 40 years. Each was accustomed to dealing with the other on a handshake basis. Each could reasonably assume and did assume that the other was bound by his word and would act in an ethical manner founded on good faith and integrity.

45. During the 1990's, Gallivan acted as diplomat and communicator among Malone and Magness for TCI, members of the KT Board of Directors, and members of the McCarthy Family. He attempted to arrange a reorganization between TCI and KT which would be acceptable to each of those corporations, and which would meet the conditions of the McCarthy Family aimed at preserving control of the newspaper in the descendants of Senator Kearns and ensuring that Utah had a newspaper with an independent voice. To do so, Gallivan communicated various proposals among the participants.

Requirement That There Would Be No Agreement between TCI and KT without Satisfying the Conditions of the McCarthy Family

46. In 1997, each of the individual members of the McCarthy Family owned beneficially (based on ownership by the QTIP Trust) or of record, shares of KT. At that time, the aggregate shares of KT owned of record and beneficially by the McCarthy Family totaled

just under 40% of KT's issued and outstanding shares . The McCarthy Family as a group was the largest shareholder of KT.

47. In 1997, there were more than one hundred individual shareholders of KT. Many owned KT shares through the KT Employee Stock Option Plan. Most owned far less than 1/10 of one percent of the outstanding shares of KT.

48. While there are a number of different lines of progeny of Senator Kearns, the McCarthy Family represented not only the largest percentage ownership of KT, it was and had been through all of the 20th century the group most committed to continued ownership of KT and the continuation of its independent voice..

49. *Beginning in about 1994 and continuing through 1997, Gallivan communicated to the KT Board of Directors and members of the McCarthy Family various reorganization proposals which he had discussed with Malone and TCI, and which he believed would solve the liquidity and estate tax problems of KT. Before February 1997, the McCarthy Family had rejected all such proposals.*

50. In 1995, the KT Board of Directors appointed a special committee to hire counsel and evaluate various reorganization alternatives. Phillip McCarthy was a member of the special committee.

51. KT's Board of Directors and its special counsel endeavored to structure a transaction which would defer taxation until an eventual sale of TCI shares by individual KT shareholders.

52. Members KT's Board of Directors and special counsel concluded in 1997 that the desired tax treatment of a TCI-KT merger could be achieved.